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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

W. T. STEWART, Trustee of the Estate of W. F. LIVINGSTON, Bankrupt, et al.,
Petitioners,

vs.

J. P. DYAR,
Respondent.

No. 854

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, W. T. Stewart, Trustee of the estate of W. F. Livingston, bankrupt, and J. F. Stewart, separately and severally, respectfully show to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit instituted by original petition of J. F. Stewart as a creditor of the estate of W. F. Livingston, a bankrupt, against J. P. Dyar, seeking to have a private sale of the bankrupt's real estate from J. Marvin Kelley, as trustee, to J. P. Dyar, the purchaser, set aside. The suit was originally filed in the United States District Court for the Northeastern Division of the Northern District of

Alabama and is based upon any one of three theories, namely: (1) that the price paid by J. P. Dyar for said property to said trustee in September, 1932, was so grossly inadequate as to shock the conscience of the court; (2) that said sale was greatly inadequate and was so tainted with the gross negligence of the trustee in and about his duties in the management and supervision of the bankrupt estate and in and about the procurement of a purchaser and in and about the selling of said property as to amount to a fraud on the creditors; (3) that in addition to the great inadequacy of the sale price the circumstances surrounding the sale, namely, the fraud on Stewart in the forgery of his name and lack of notice to him, require the sale to be set aside and a new trustee appointed over the bankrupt estate.

The trial of the case in said District Court resulted in a judgment for the petitioner, J. F. Stewart (Record 80, 81). Respondent appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment and remanded the cause (Record 198, 199, 200 and 201). Petition for rehearing was denied (Record 209) and petitioners bring the case here by this petition of certiorari.

STATEMENT OF FACTS.

On November 27, 1927, W. F. Livingston filed his petition (Record 9 et seq.) for adjudication as a bankrupt in the District Court of the United States for the Northeastern Division of the Northern District of Alabama at Huntsville, Alabama, and was, on November 28, 1927, adjudicated (Record 14 and 15) a voluntary bankrupt. On December 10, 1927, J. Marvin Kelley of Hartselle, Alabama, was appointed and duly qualified as Trustee of the bankrupt estate; his bond was set at $500.00, and J. F. Stewart became a surety thereon. Following his appointment as

trustee, Kelley never had any appraisement of the properties of the estate made as to value.

On December 16, 1926, the Farmers & Merchants Bank of Hartselle, Alabama, filed a suit (Record 149) in the Circuit Court of Lawrence County, Alabama, in Equity, attacking as fraudulent a prior deed from the bankrupt to his nephew, P. L. Livingston, conveying 557 acres of land, seventy of which are in Morgan County and the remainder in Lawrence County, and of this acreage 438, including the seventy acres in Morgan County, are involved in the present suit. Later, and on January 14, 1928, Kelley, as Trustee, filed his petition in the bankrupt court for leave to intervene in the State Court suit, and stated as one of the reasons for wanting to intervene that the property was worth from $10,000.00 to $15,000,00. On the same date the petition was granted (Record 22 and 23).

This suit was successfully terminated for the complainants by decree rendered on November 19, 1929, setting aside the conveyance from W. F. to P. L. Livingston and vesting title thereto in Kelley as Trustee (Record 156). Prior to this, John R. Sample, an attorney who represented the complainants in this suit, and who also represented most of the creditors, including J. F. Stewart, had died, his death occurring on January 13, 1929.

Kelley, as Trustee, filed his petition in the bankrupt court on January 30, 1930 (Record 23 et seq.), seeking leave to sell the 557 acres, stating that it could be sold to the best advantage if sold at private sales rather than in subdivisions (Record 24 and 25). The prayer was that a time be set for the hearing of the petition, proper notices given, and for a private sale, either en masse or in subdivisions, or in the alternative, asking that a public sale be decreed if this was thought best. Ten days notice by mail was not attempted to be given, but on September 16, 1930, Kelley

filed an instrument purporting to be signed by thirteen creditors of the bankrupt, including J. F. Stewart, acknowledging notice of the filing of this petition by Kelley to sell and consenting that a decree be entered authorizing the Trustee to sell the lands in such manner as the Court might direct (Record 25 and 26). The Claim Docket in the bankrupt case showed those creditors whose claims were allowed, sixteen in all (Record 141). Only thirteen names of creditors purportedly appear on the waiver above mentioned, the names of creditors J. C. Harris, W. F. Stewart and J. C. Freeman not purporting to appear on this waiver.

On the date this waiver was filed, September 16, 1930, Honorable Jere Murphy, now of counsel for appellant, and then Referee, entered a decree authorizing the private sale of the 557 acres en masse or in subdivisions as Kelley thought best. The sale was to be for cash and subject to confirmation (Record 27 and 28). A report of sale was made and filed on September 10, 1932, by Kelley (Record 29, 30 and 31), showing a sale to appellant for $1,500.00 cash, of 557 acres with Kelley to pay off a mortgage and certain taxes against the property. This report was sworn to in Montgomery, Alabama, on September 8, 1932, and on September 10, 1932, at Decatur, Alabama, Jere Murphy, Referee, entered an order confirming the sale to appellant (Record 31 and 32).

However, previous to the date of making the report of sale and previous to confirmation of the private sale by Referee Murphy on September 10, 1932, and on September 6, 1932, J. Marvin Kelley executed a deed to this 557-acre tract above mentioned (Record 162-164). This deed was signed by Kelley, individually, and was acknowledged by him as an individual. It is of record in the office of the Judge of Probate of Lawrence County, Alabama, of date of September 17, 1932, and though it described therein the seventy acres situated in Morgan County, Alabama, it was

never recorded in the office of the Probate Judge of Morgan County.

Thereafter, and on December 6, 1932, Kelley, as Trustee, filed his report of the sale and disbursement of the funds received from the sale with the Referee (Record 33, 34). This report shows that of the sum of $1,500.00 received from Dr. J. P. Dyar the following disbursements were made:

Discharge of mortgage	$284.83
Payment of taxes	140.00
Refund to A. J. Harris for taxes paid, plus interest	322.36
Attorney's fee	300.00
State Court costs	87.30
Trustee's commissions	70.00
Check tax	.12
Balance	$295.39

The balance on hand of $295.39 was then placed in the Farmers & Merchants Bank of Alexander City, Alabama, by the Trustee, and was thereafter transferred to the Tennessee Valley Bank of Decatur, Alabama, by the Trustee, where the same was on deposit when the Bank closed during the Bank holiday of 1933. The Trustee testified that during the years from 1930 to 1932 he was spending every other week-end in Alexander City, Alabama, and it was more convenient for him to place the money there than in a bank in Morgan County, Alabama. Incidentally, during this period of time, he was engaged extensively in the Alabama State Legislature at Montgomery, Alabama, as a Senator from Morgan and Lawrence Counties, Alabama.

Of this sum of $295.39, $103.38 was paid to the Trustee as dividends by the Tennessee Valley Bank of Decatur after its liquidation (Record 34, 35). After the bank dividends were received the Referee declared a 2 per cent dividend on all unsecured claims, and, on August 20, 1940, creditor's checks representing said dividends were mailed

to J. M. Kilpatrick at Cullman, Alabama, who was the surviving member of the partnership of Sample & Kilpatrick, which was dissolved by the death of John R. Sample on January 13, 1929. Some time after August 20, 1940, the Referee in Bankruptcy for the Northeastern Division of the Northern District of Alabama discharged the Trustee, J. Marvin Kelley. This final report of Kelley, set out on record pages 34 and 35, was filed on September 3, 1940, and the discharge granted on September 11, 1940. On September 22, 1940, the Referee, David A. Grayson, mailed notices (Record 178) to all the creditors of W. F. Livingston stating that objections to the discharge of the bankrupt must be filed within thirty days from that date or the discharge would be granted, and on October 22, 1940, J. F. Stewart filed with the bankrupt court his objections to the discharge of the bankrupt (Record 36 et seq.).

The hearing on the objections of J. F. Stewart to the discharge of the bankrupt was set for hearing on December 14, 1940, but, on November 29, 1940, J. F. Stewart filed his petition, the initial pleading of the case at hand (Record 41 et seq.), and upon filing the same, the Honorable T. A. Murphree, Judge of the District Court of the United States for the Northern District of Alabama, entered an order directing the Referee, David A. Grayson, to refrain from hearing the objections to the discharge of Livingston until the petition then filed before him had been disposed of. At the time of the filing of Stewart's original petition, on November 29, 1940, he deposited with the Clerk of the District Court at Birmingham a cashier's check of the Citizens Bank of Hartselle, Alabama, for $4,000.00 to support his offer to purchase the property involved in this suit at a price of not less than $10,000.00 (Record 51).

The preceding constitutes our statement of the background of the case in so far as it relates to the subject

matter of the same occurring prior to the hearing of the cause on March 31, 1941, before the District Court in Birmingham. We believe the facts hereinabove stated are entirely undisputed and conceded by both sides, and we would next hereinbelow make a statement of the case as taken from the testimony of said cause had on the hearing of March 31, 1941, and some of which will bring in matters in dispute between the parties.

Immediately following Kelley's appointment and qualification as Trustee in Bankruptcy of W. F. Livingston, and in 1929 (Record 112 et seq.), Kelley went into possession of the suit property, but he never saw the property, never went on it, never went out to it, never saw the tenants thereon, but turned the management of the property over to one W. M. Chenault, a real estate agent, of Decatur, Alabama, from whom he said he never collected any rentals, and with whom he is not shown to have had any definite contract, but who testified that he did pay Kelley rentals from off this property. During the years 1930, 1931 and 1932 Kelley was greatly involved in other matters, including a very hot political race in Morgan and Lawrence Counties, Alabama, for State Senator, and following his election he was, during the years of 1931 and 1932, and during two sessions of the Legislature, present four or five days of every week in Montgomery, Alabama, and he was in Alexander City, Alabama, at the home of his wife's mother, on every other week-end; and his absence from Morgan and Lawrence Counties was so marked that he transferred the funds of the bankrupt estate to a banking house in Alexander City.

All that Chenault, with whom Kelley left the management of the property, did (Record 126, 128) was to go out to the place and collect rents from a Mr. Brown and a Mr. Bailey. In fact, he stated that all he did was to see who was working and what he could collect; that he did

not supervise the working of the farm and he did not interest anyone in the sale of the land, and there is no testimony that he ever attempted to interest anyone at all. In addition, Kelley did contact Messrs. Jackson, Bragg and Weatherwax, of Moulton, Alabama, and requested that they, as a personal favor to him, try to find someone to take this property off his hands, but he offered them no compensation or remuneration for such, and this was simply to be done because of their friendship. Jackson testified that he never attempted to dispose of the property by sale to anyone. The sale was made to Dyar in 1932, and it was the first offer that Kelley had ever had on the property, and he sold it, sight unseen, without consulting anyone as to whether the price offered was fair and reasonable and without knowledge of the value of said lands (Record 113). The total acreage set aside in the suit filed by the Farmers & Merchants Bank was 557 acres, and all of this was deeded to Dyar by Kelley for the consideration of $1,500.00 gross. There is a tract of 109 acres which was claimed by a third party, from whom Dyar later purchased, and to which Kelley later gave a quitclaim deed to Dyar for the consideration of $1.00 (Record 166); 438 acres of the remaining 447 acres are the subject matter of this suit, and around this there arises a question as to the value of the same.

On the trial of this case on March 31, 1941, there was a wide discrepancy as to the value of this acreage as of 1932. The witnesses for the appellant, without exception, stated the value to be a flat $1,500.00 as of September, 1932, though one witness did state it was worth from $1,250.00 to $1,750.00, which is a mean figure of $1,500.00. These witnesses consist of the appellant himself; W. R. Jackson, one of the sureties on the supersedeas bond of the appellant; Dick Vest, a community farmer of the locality where the suit property is located; W. M. Chenault, previously

mentioned above, and L. W. Gentry, an employee of a bank in Moulton, of which appellant is now Vice-President and was a Director as of 1932.

Our witnesses were three in number, two real estate dealers, John T. Kyle and Lamar Penney of Hartselle and Decatur, respectively, and J. S. Sandlin, a former Sheriff of Morgan County, Alabama, and a resident of the community in which this property was located. These witnesses testified on breakdown figures, that is, the value of various portions of the property figured on condition, productivity, rent, and location of the property in question as of 1932. Their testimony, when taken together, figuring various prices for various portions of the property of different character, bring the testimony of each as to the value of the land as of 1932 in the neighborhood of $8,500.00. These witnesses testified orally before the lower court, and the lower court found as a fact that the price paid by Dr. Dyar was grossly inadequate as of the date of the purchase (Record 180).

Another disputed item arises in the fact as to whether or not J. F. Stewart ever had notice of the filing of Kelley's petition for allowance to sell the suit property at private sale, and whether or not he waived the same in writing. By an alleged waiver purporting to bear the name of J. F. Stewart (Record 25, 26), appellant contends that Stewart signed his name to this paper. This fact is asserted by Kelley in his testimony, though he is unable to state when, where, or in whose presence this paper was allegedly signed by Stewart, which fact is denied by Stewart; and, further, the statement is made by Stewart that he never saw or heard of this paper until October, 1940, when he viewed it at Huntsville, Alabama. Stewart is positive to the effect that the first notice he ever had of the sale occurred after receiving a post-card of date September 22, 1940, from Referee Grayson advising him that he would

have to file his objections to the application for a discharge on behalf of the bankrupt, Livingston, and that thereafter he consulted another creditor of Livingston and later employed an attorney, with whom he went to Huntsville, Alabama, to view the file in this case, and there first saw the paper to which it is claimed his name is attached.

The original waiver was sent to the Circuit Court of Appeals for its inspection and also for its inspection was the purported signature of J. F. Stewart. Likewise, along with this waiver, there was forwarded to said Court two original checks admittedly drawn by J. F. Stewart and bearing his genuine signature as of a date not more than a month away from the purported date of the alleged waiver. In addition, the waiver, as hereinabove stated, bears at most only thirteen alleged names and signatures of the admittedly sixteen creditors whose claims were allowed by the Bankruptcy Court.

The testimony of Stewart is further direct to the point that in 1927 he employed John R. Sample, an attorney of Hartselle, Alabama, to file his claim on his behalf, and that Sample assured him he would be paid out. Sample then died in January, 1929, before the Circuit Court of Lawrence County, Alabama, in Equity, set aside the conveyance by W. F. to P. L. Livingston of the suit property and vested title thereto in Kelley, as Trustee. Stewart discloses that he had no conversations, questionings, or inquiries with Kelley or anyone else with reference to the sale of this property or the proceeding thereof at any time. Furthermore, he is positive to the effect that he never knew of any petition filed by Kelley, for leave to sell the property, any efforts of Kelley to sell it, any conferences with Kelley about selling it, or buying it, or any solicitations by him to buy it at any time nor was he ever paid any dividend or offered any dividend until September, 1940, and this he declined.

In addition, Stewart testified that he did not know that Dr. Dyar was not in possession of this property, renting it or cultivating it, or that he claimed it, but that he had known the property for twenty or thirty years in a general way, knowing it as the Livingston property, and did not know that any claim was being made at any time to any portion of it by Dyar. He had retired from active business several years prior to the filing of the petition and was not engaged in the general mercantile business, which he was with the farmers of Hartselle and vicinity during the period of years prior to Livingston's bankruptcy and for several years thereafter.

On May 2, 1941, the Court entered an order, judgment or decree finding the issues in favor of the petitioners (Record 179, 180 and 181).

The Honorable T. A. Murphree, as Judge of the District Court, in his original order on May 2, 1941, made the following findings of facts to be true in this cause:

> "1. The price paid by Dr. J. P. Dyar for the property purchased by him from the Trustee in Bankruptcy in this cause was grossly inadequate at the time of said purchase.
>
> "2. The petitioning creditor, J. F. Stewart, received no notice of the proposed sale or order to sell the said property prior to the time of the sale to Dr. J. P. Dyar.
>
> "3. The petitioning creditor, J. F. Stewart, received no notice of the sale of the said property to Dr. J. P. Dyar prior to October, 1940.
>
> "4. Certain intervening equities have arisen as to part of the said property, preventing an order of this Court setting aside the said sale as to that part of the property."

After the rendering of the decree of this case on May 2, 1941, and in accordance therewith, W. T. Stewart was

appointed Trustee for the bankrupt estate of W. F. Livingston and qualified as such on May 17, 1941, posting a bond in the sum of $20,000.00. Thereafter, and on May 19, 1941, notice of appeal was filed by the respondent in this case, and on the same date a supersedeas bond in the sum of $2,500.00 was given, payable to W. T. Stewart, Trustee of the estate of W. F. Livingston, bankrupt (Record 188 and 189), and W. T. Stewart, as trustee, is a party to this appeal and appears in this Court represented by counsel (Record 184 and 185).

Petitioners herein, appellees in the Circuit Court of Appeals, cited cases and authorities upholding each of the findings of fact and the conclusions of the law of lower court and argued said propositions orally before the Circuit Court of Appeals on October 21, 1941.

On November 12, 1941, the Circuit Court of Appeals filed its opinion (Record 198, 199, 200 and 201) reversing the order of the District Court and remanding the cause, in which it held:

1.

> "Stewart testified positively that he never had notice that the sale was to be made; that he did not sign the creditor's consent; and that his name on this paper was a forgery. The trustee, J. Marvin Kelley, who had received his discharge at the time of the hearing of Stewart's petition, testified that Stewart did sign the paper in his presence; that he and Stewart discussed the selling of the farm; and that he 'asked him if he could buy it, but he wasn't interested in buying it.' He further testified that he discussed the sale of the farm lands with Stewart 'before the sale and after the sale'; that Stewart knew he had sold the farm to Dyar; and that after the sale of the farm to Dyar he deposited the money in a bank that failed and Stewart 'asked me what we were going to do since the bank failed' " (Record 200).

2.

"Kelley was a disinterested witness and we see no reason for rejecting his testimony in this matter" (Record 200).

3.

"Moreover, it appears that Stewart, who was represented by able counsel, filed his claim in the bankruptcy court and submitted to its jurisdiction; that he lived within about ten miles of the lands in question; and that he regarded the matter with indifference for eight years when he could have by the exercise of little effort determined the status of these lands at any time. When Dr. Dyar purchased the land nine years ago it was inaccessable, run down and unkempt. Since the purchase of the land in 1932 Dr. Dyar has built terraces on the land, has cleared much of it, and a road has been built. Eight years have passed since the confirmation of the sale, the rights of the parties have become fixed, and Stewart may not now be heard to complain that he had no notice of the sale. Bray v. U. S. F. & G. Co., 267 Fed. 533; In re Verdon Cigar Co., 193 Fed. 813" (Record 200, 201).

4.

"We find no merit in the contention that the price received for the land was so grossly inadequate as to authorize cancellation of the deed. The testimony as to the value of the property in 1932 is in sharp conflict. Witnesses for Dyar place the value as of 1932 at from $1250.00 to $1750.00, and the witnesses for Stewart say it was worth about $8,500. Certain it is that in the light of present day conditions property which sold for low prices on an inactive market during the depression will now bring much higher prices on an active real estate market. However, in determining the reasonable market value of the lands in suit, we must go back and live again in the days of the bitter depression of 1932. Furthermore, mere inadequacy of price is not sufficient to create a pre-

sumption of fraud. To authorize the court to set aside a conveyance on the ground of inadequacy of price, the inadequacy must be 'so glaring and gross as at once to shock the understanding and conscience of an honest and just man.' Danforth v. Burchfield, 201 Ala. 550, 78 So. 904, 905; Dunn v. Ponceler, 235 Ala. 269, 178 So. 40, 44; 27 C. J. 484, §135" (Record 200).

On December 1, 1941, petitioners filed a petition for rehearing in the Circuit Court of Appeals, in which they pointed out and complained that the opinion of the Circuit Court of Appeals was erroneous wherein it held the following:

1. "Kelley was a disinterested witness and we see no reason for rejecting his testimony in this matter" (Record 204).

2. "Moreover, it appears that Stewart, who was represented by able counsel, filed his claim in the bankruptcy court and submitted to its jurisdiction; that he lived within about ten miles of the lands in question; and that he regarded the matters with indifference for eight years when he could have by the exercise of little effort determined the status of these lands at any time. When Dr. Dyar purchased the land nine years ago it was inaccessable, run down and unkempt. Since the purchase of the land in 1932 Dr. Dyar has built terraces on the land, has cleared much of it, and a road has been built. Eight years have passed since the confirmation of the sale, the rights of the parties have become fixed, and Stewart may not now be heard to complain that he had no notice of the sale. Bray v. U. S. F. & G. Co., 267 Fed. 533; In re Verdon Cigar Co., 193 Fed. 813" (Record 205).

3. "However, in determining the reasonable market value of the lands in suit, we must go back and live again the days of the bitter depression of 1932" (Record 206).

4. "Furthermore, mere inadequacy of price is not sufficient to create a presumption of fraud. To authorize the court to set aside a conveyance on the ground of inadequacy of price, the inadequacy 'Must be so glaring and gross as at once to shock the understanding and conscience of an honest and just man.' Danforth v. Burchfield, 201 Ala. 550, 78 So. 904; Dunn v. Ponceler, 178 So. 40, 44; 27 C. J. 484, §135" (Record 207).

In their petition for a rehearing petitioners cited cases and decisions of the Supreme Court of the United States and of several of the Circuit Courts of Appeals, and from the Supreme Court of the State of Alabama, and the Rules of the District Court of the United States, all agreeing with petitioners' contentions and stating the law upon the respective excerpts of the opinion of said Circuit Court of Appeals to be as follows:

1. That the Circuit Court of Appeals should not decide the credibility of one witness over the credibility of another witness where said witnesses personally appeared before the trial court and the trial court made a finding of the facts supporting its conclusion and judgment, which were not shown to be clearly erroneous.

2. That the facts above quoted in excerpt No. 2 do not constitute laches in accordance with the laws of the State of Alabama which are controlling in this case.

3. That the opinion of the Court determining the reasonable market value of the lands in suit was based upon the Court's knowledge of the bitter depression of 1932 and not upon the evidence and the presumption in favor thereof, in accordance with the findings of the trial court.

4. The facts and the conclusions of the trial court on gross inadequacy of price show inadequacy of price so gross as at once to shock the conscience of an honest and just man,

and the Circuit Court of Appeals has attempted by its opinion to draw a hair-line distinction between gross inadequacy and mere inadequacy of price holding that a ratio of eight to one to ten to one of the real value of the property by the decision quoted in the opinion is gross inadequacy, where the testimony showed that in this case that the ratio between the sale price and the value of the property was seven to one and in ignoring the presumption to be indulged in favor of the trial court and its findings.

Said petition for rehearing was overruled by said Circuit Court of Appeals on December 16, 1941 (Record 209).

Petitioners submit that said Circuit Court of Appeals committed error in deciding said propositions of law so presented to it by petitioners, both in their original brief filed in said court and in their motion for a rehearing. Wherefore, petitioners, separately and severally, present to this Honorable Court the following questions:

QUESTIONS PRESENTED.

1. Where the testimony of the only two witnesses, as to a material fact, is in direct conflict, and the District Court, which saw and heard the witnesses testify, adjudges the issue as between the two in favor of one, and makes a finding of fact in its opinion to that effect, does the mere fact that the Circuit Court of Appeals finds that one of the witnesses, the one against whom the District Court decided the issue of fact, is a disinterested witness and no reason is shown to disbelieve his testimony in their opinion, justify the reviewing court in setting aside and reversing the District Court's finding of fact?

2. Is the Circuit Court of Appeals justified in passing upon the credibility of witnesses who testify before the District Court which made a finding of fact on the testimony of the witnesses on a material disputed issue?

3. In determining valuation of property during the year 1932, is the Circuit Court of Appeals justified in reversing the findings of fact of the District Court as to the value of the property where the testimony of such witnesses is in sharp conflict and the reversal by the Circuit Court of Appeals is placed upon the ground that the fact that property today brings more than it did in 1932 and the additional fact that in determining value, the low prices prevailing in the year 1932 must be taken into account and recalled?

4. Does lapse of time short of the Statute of Limitations bar relief on account of laches where the parties involved can be restored to their original position without harm being wrought to either party involved?

5. Was the Circuit Court of Appeals in error in reversing the finding of fact of the District Court numbered One as follows:

> "The price paid by Dr. J. P. Dyar for the property purchased by him from the Trustee in Bankruptcy in this cause was grossly inadequate at the time of said purchase." (Record 180)?

6. Was the Circuit Court of Appeals in error in reversing the finding of fact of the District Court numbered Two as follows:

> "The petitioning creditor, J. F. Stewart, received no notice of the proposed sale or order to sell said property prior to the time of the sale to Dr. J. P. Dyar." (Record 180)?

7. Was the Circuit Court of Appeals in error in reversing the finding of fact of the District Court numbered Three as follows:

> "The petitioning creditor, J. F. Stewart, received no notice of the sale of the said property to Dr. J. P. Dyar prior to October, 1940." (Record 180)?

REASONS FOR GRANTING THE WRIT.

I.

The trial court's findings of fact, being based upon the evidence and not having been found to be clearly erroneous, should not be disturbed by the reviewing court. The decisions of the Circuit Court of Appeals disturbing the findings of fact of the trial court is in direct conflict with the decisions of the Supreme Court in **Tilghman v. Proctor,** 125 U. S. 136, 149, 150; **Furrer v. Ferris,** 145 U. S. 132, 134; **Warren v. Keep,** 155 U. S. 265, 267, and **Adamson v. Gilliland,** 242 U. S. 350, 37 Sup. Ct. Rep. 169, 170.

(a) Said decision of said Circuit Court of Appeals is in direct conflict with the following decisions of said Court:

Stevens v. Edwards (C. C. A. 5), 112 Fed. (2d) 92, 94;

Rutland Savings Bank of Rutland, Vt., et al. v. Wilson et al. (C. C. A. 5), 108 Fed. (2d) 92, 94.

(b) Said decision of said Circuit Court of Appeals is in direct conflict with the following Rule of Procedure of the District Court:

Rule 52 (a), Civil Rules of Procedure, formerly Equity Rule 70½.

(c) Said decision of said Circuit Court of Appeals is in direct conflict with the following Notes of the Advisory Committee on Rules:

28 U. S. C. A., following Section 723C, page 677;
8 Fed. Code Annot., page 733, following Rule 52.

II.

In holding that the testimony of the witness Kelley is to be accepted and that of the witness Stewart is to be rejected,

the Circuit Court of Appeals is deciding the credibility of one witness over another in the credibility of the various witnesses, and in so holding, the decision of said Circuit Court of Appeals is in direct conflict with the following decisions and rule of Court:

Webb v. Frisch (C. C. A. 7), 111 Fed. (2d) 887, 888;
Campana Corporation v. Harrison (C. C. A. 7), 114 Fed. (2d) 400, 405;
Rule 52 (a) of Civil Rules of Procedure.

III.

Said Circuit Court of Appeals, by ruling that the discrepancy between the market value and the sale price of the lands from the Trustee to Dr. Dyar was mere inadequacy, ignored the findings of fact of the trial court that the discrepancy constituted gross inadequacy in price at the time of said purchase. The decision of said Circuit Court of Appeals adjudging the facts to be mere inadequacy is in direct conflict with the following decision of the Supreme Court of Alabama referred to in its decision:

Danforth v. Burchfield, 201 Ala. 550, 78 So. 904.

IV.

The testimony was in conflict as to what notice, if any, Stewart received regarding possession of the suit property by Dyar. The changed conditions in the property from date of sale to date of suit were negligible, and all improvements, which were not many, could easily have been determined and just compensation paid therefor. The condition of the parties had not become fixed to where they could not be restored to their former status without injury to either property, and under said circumstances, in the face of adverse findings of fact by the trial court, said Circuit Court of Appeals decided the question of laches in

direct conflict with the decisions of the Supreme Court of Alabama:

Hausser v. Foley & Company, 190 Ala. 437, 67 So. 252, 253;
Bart v. Stewart, 235 Ala. 330, 179 So. 232, 233;
Rule 52 (a), Civil Rules of Procedure.

Wherefore, your petitioners, separately and severally, respectfully pray that a writ of certiorari be issued by this Honorable Court and that the judgment of the Fifth Circuit Court of Appeals be reversed and rendered.

BENTON LITTLETON BRITNELL,
Decatur, Alabama,
Solicitor for Petitioners.